IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

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*In re the Personal Restraint of*

JAMES CHARLES MATHES,

Petitioner.

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REGARDING THE JUDGMENT AND SENTENCE ENTERED BY
THE SUPERIOR COURT OF KITSAP COUNTY
Superior Court No. 14-1-00301-1

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# BRIEF OF RESPONDENT

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| | John Henry Browne<br>801 2nd Ave Ste 800<br>Seattle, Wa 98104-1573<br>Email: johnhenry@jhblawyer.com | This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.<br>DATED September 20, 2018, Port Orchard, WA<br>**Original e-filed at the Court of Appeals; Copy to counsel listed at left.**<br>**Office ID #91103 kcpa@co.kitsap.wa.us** |

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## II. RESPONSE

The State respectfully moves this court for an order remanding the matter to correct an erroneous offender score and resentence and dismissing the remainder of the petition with prejudice because the claims lack proof and merit.

## III. STATEMENT OF THE CASE

The following is quoted from the state's responsive brief on direct appeal with additional facts added to address the issues raised herein. Citation is to the certified record on direct review.

### A. PROCEDURAL HISTORY

James Charles Mathes was charged by first amended information

filed in Kitsap County Superior Court with two counts of first degree assault with firearm and law enforcement victim special allegations, two counts of second degree assault (in the alternative, same victims as first degree assaults) with firearm and law enforcement victim special allegations, first degree kidnapping with domestic violence and firearm special allegations, unlawful imprisonment (alternative to kidnapping, same victim) with domestic violence and firearm special allegations, assault in the second degree on Michelle Toste with domestic violence and firearm special allegations, assault second degree on Roy Mathes with domestic violence and firearm special allegations, felony violation of a court order with domestic violence and firearm special allegations, felony harassment with domestic violence and firearm special allegations, and unlawful possession of a firearm. CP 92-103.

At trial, lesser included offense instructions were given as to the first degree assault counts (second degree assault lesser includes at CP 147 and CP 153). And, a lesser included offense instruction on unlawful imprisonment was given with respect to the kidnapping count. CP 158. The jury found Mathes guilty on all the greater offenses as charged and answered all special allegations in the affirmative. CP 189-200. With the exception of the court order violation and harassment counts, which were sentenced below the standard range, Mathes received a standard range

sentence totaling 720 months. CP 205. This included consecutive sentencing on the two first degree assault convictions. Id. Mathes timely filed a notice of appeal. CP 215.

The sentence is based on an incorrect offender score. The judgment and sentence show that all prior felonies save one have washed out for scoring purposes. CP 201-202. The one prior felony scored as one point, cause 92-1-00857-1, was in error. Appendix A.[1] The crime of conviction there was unlawful possession of more than 40 grams of marijuana, a class C felony. RCW 69.50.401. That offense should not have been scored. Interestingly, the judgment and sentence in 92-1-00857-1 does, however, list as prior history three counts of second degree burglary in juvenile court. Appendix A.

Pretrial, a CrR 3.5 hearing was conducted. 1RP 30. Mathes had been shot by deputies during the incident and was hospitalized. Six deputies testified about statements made by Mathes while being transported to or while in the hospital. 1RP 33-72; 1RP 114-120. The trial court ruled that one statement made after a request to speak to an attorney was inadmissible (1RP 130) but that all other statements were subsequent to advisement of rights and were not responses to interrogation and were therefore admissible Id. No reference to CrR 3.1 is found in the

[1] Appendix A is not certified. It is included to explain the otherwise unexplained

CrR 3.5 hearing.

Among the issues litigated was the defense offer of the testimony of Kenneth Muscatel, Ph.D. in an attempt to establish a diminished capacity defense. Dr. Muscatel twice presented offers of proof regarding that defense, once pretrial and once near the close of the evidence. Each time, the trial court ruled that the testimony failed to meet Mathes's burden in asserting the defense. 1RP 107-110; 5RP 641.[2]

## B. FACTS

Victim Michelle Toste had known Mathes for eight years. 2RP 188. She had a romantic relationship with him and they have a child in common. 2RP 188-89. On December 30, 2013, Mathes called Ms. Toste at about eight o'clock and wanted to see her. 2RP 190. Ms. Toste was aware of a no contact order prohibiting Mathes from contacting her. 2RP 191. He picked her up and the two went to his mother's house. 2RP 192. The two "messed around" and then talked. 2RP 194.

Mathes decided that Ms.Toste was lying to him about another man and pulled a gun from beneath the mattress. 2RP 195. He pointed the gun at her and led her to another room. 2RP 196. She was scared. Id. He

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offender point error.

[2] Summary of Dr. Muscatel's testimony is included below under the heading "Mathes's

wanted more drugs so she called her daughter hoping to hint that she needed help. 2RP 198-99. She could not say much on the phone because he had a gun to her head. 2RP 201. She was not free to leave and was suffering an anxiety attack. Id. Her daughter came to them at around 5:00 in the morning and Ms. Toste was able to whisper that Mathes had a gun. 2RP 202-03.

Eventually, they left the house and traveled in his car to get coffee and she tried to get the attention of the coffee people without success. 2RP 207-08. She could not directly ask for help because Mathes threatened to shoot her and anyone else present. Id. She believed him. Id. They then drove around and Mathes kept the gun between his legs. 2RP 209. Mathes fired the weapon and advised Ms. Toste that that could be her head. Id. Mathes drove around at high speed further scaring Ms. Toste. 2RP 215. Eventually, they returned to Mathes's mother's house. Id. It is now about 12:00 noon. 2RP 216.

Soon, Mathes's father, Roy Mathes, arrived. 2RP 216. Inside, Mathes put the gun to his father's head. 2RP 217. Then, Ms. Toste's daughter, Stephanie, came to the house. 2RP 219. While Stephanie was there, Mathes forced Ms. Toste to sit in his lap with the gun in her back. 2RP 220. Mathes wanted Stephanie to get $20,000 so he could flee to

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Mental State."

Mexico. Id. Soon the 911 operator called the house. 2RP 221. She told 911 that she was okay because Mathes had the call on speaker. 2RP 222.

The 911 operator advised that law enforcement was outside. 2RP 223. The four walk outside while Mathes askes Ms. Toste to get in the car. 2RP 223-24. Roy Mathes testified that he said that he, Roy, should move his car or "he's going to shoot her right on the spot." 2RP 269. She saw uniformed police outside and Mathes got in the car. 2RP 227. Then, "Jim gets out of his car and fires at the cops." 2RP 229. He fired the gun three or four times and Ms. Toste and her daughter ran. 2RP 230. Ms. Toste heard law enforcement return fire. 2RP 231. Ms. Toste saw Mathes on the ground having been shot and Mathes called out to his father "I love you pops, that bitch deserved what she got." 2RP 236.

Law enforcement had approached the house with caution, there being no cover on approach to the house. 3RP 349-50; 352. When the people came out of the house, they were commanded to show their hands. 3RP 354. The two victim deputies, Herron and Lont, were together in the driveway. 3RP 355. Then, "all of a sudden, he stands up out of the car and he immediately turns towards us after getting out of the car and takes that traditional two-handed shooting stance and he's got something metallic in his hand and he's right over the car, right pointed towards us." 3RP 358. Deputy Herron was "absolutely convinced" that Mathes was going to shoot them. 3RP 359.

### *1. Mathes's Mental State*

The defense offered the testimony of Kenneth Muscatel, Ph.D. The state responded with a report from Richard Yocum, Ph.D., a psychologist from Western State Hospital. CP 58.

#### a. Lay Witnesses

Victim Michelle Toste described Mathes as not himself. RP. He was not making sense when he phoned her in the evening. 2RP 191. They drove to Mathes's mother's house without incident. 2RP 193. There, Mathes's crimes began when he pulled a gun when Ms. Toste denied that she was having an affair with someone else. 2RP 194-95.

Ms. Toste believed he was under the influence of drugs. Id. She had seen him shoot drugs into his arm. 2RP 213. She thought it was heroin and that it affected his subsequent behavior. 2RP 237. He held the gun to her and moved her to the living room because he was hearing things. 2RP 196.

After holding Ms. Toste at gun-point for hours while they drove around, they went to Mathes's house. 2RP 214. When asked if he seemed rational at this point, she said he seemed nervous and paranoid. Id.

Later, at Mathes's mother's house, Mathes held the gun to his father's head. Id. Ms. Toste said that when this all happened Mathes was acting different. 2RP 239. She said it wasn't Jim and he was paranoid

and may have been hallucinating. 2RP 239-40. When asked if she thought he knew what he was doing, she said she didn't know. 2RP 240.

Mathes's father, Roy Mathes, testified to events when he arrived at the house. 2RP 264. Mathes stuck a gun in his side. 2RP 265. They went in the house and Mathes pulled out the gun and pointed it at his father. 2RP 266. They sat down and Roy looked in Mathes's eyes and "there was nobody home there … He was gone." 2RP 267.

The defense called Janelle Jones. 5RP 668. She was working at a convenience store on the date of the incident. 5RP 669. She saw Mathes in her store that day. 5RP 670. She came to work at around 12:30 that day. Id. Mathes purchased cigarettes and two Icies. 5RP 671. Jones had known Mathes as a regular customer for over a year. Id. Mathes was "just normal, happy, joking around." Id. He didn't seem to be under the influence of anything and acted "just normal." 5RP 674. Mathes did not seem stressed or paranoid. 5RP 675. Mathes was able to complete the store transaction and appropriately drive away. 5RP 676.

Ms. Toste's daughter, Stephanie Vierra, testified to contact with Mathes at his home (2RP 286) and at his mother's house just before the shooting. 2RP 288. She made no mention of any odd or delusional behavior by Mathes when she saw him. Similarly, several deputies who were assigned to guard Mathes while he was in the hospital, who had conversations with him and observed his behavior at the hospital, made no

remark about disorganized, delusional or otherwise odd behavior by Mathes.

**b. Expert Witnesses**

Pretrial, the defense made the first of two offers of proof from Dr. Muscatel. 1RP 76. He concluded that Mathes had a chronic mental disorder and a very serious substance abuse problem. Id. The doctor noted a history of diagnoses that included post-traumatic stress and schizophrenic disorders but found the first to be circumstantial and found no evidence of schizophrenia. Id. He believed that bipolar disorder is the most accurate reflection of Mathes's mental difficulties. Id.

Mathes was "certainly not psychotic in his presentation to me." 1RP 80. On testing, Mathes was "really making a strong presentation that he has problems, which of course meant I was going to interpret these results with caution." Id. Testing showed antisocial behavior and an aggressive attitude. Id.

Dr. Muscatel viewed his job regarding diminished capacity as "were they capable of intention, intending to engage in this kind of behavior." Id. Diminished capacity here may be the difference between "intent to assault versus an intent to defend oneself." 1RP 85. "But it's a difficult line to cross, and there has to be a lot of evidence for that." Id. This difficult line to cross was the crux of the matter:

> And thus, while his behavior was clearly intentional in the general sense, the question is whether he could have formed the intent to assault as opposed to engage in a bizarre version of self-defense. That's the only way that I think diminished capacity could possibly apply in this matter.

1RP 87. And, "The question in this case is whether that prevented him from forming the requisite intent. *That I could not answer for the court*." 1RP 88-89 (emphasis added).

When presented with the information that Janelle Jones had testified to, Dr. Muscatel believed that that was useful information that suggested that the highly disorganized, highly agitated, confused state were not present at that time just before the shooting. 1RP 91. Further, Jones' observations were inconsistent with Mathes's self-description. 1RP 92.

With regard to counts 1, 2, 3, and 4 the doctor admitted that he could not establish diminished capacity; the behavior on those counts appearing to be intentional conduct. Id. Regarding counts 5 and 6, kidnapping and unlawful imprisonment, there were "at least some foundational elements." 1RP 93. On count 7, assault on Ms. Toste, there are "foundational elements" and similarly on count 8, assault on his father. Id. Regarding count 9, violation of no-contact order, the doctor admitted that diminished capacity was not a defense and on count 10, harassment, the foundational elements were weaker; all you have to do is know you are saying the words and "I think that I would not be able to indicate

diminished capacity in that regard." 1RP 94. The doctor took no position on count 11, unlawful possession of a firearm.

Thus, Dr. Muscatel agreed that his opinions were limited to counts 5, kidnapping first degree, 6, unlawful imprisonment, 7, assault second degree, and 8, assault second degree. 1RP 95. The doctor admitted that acting in self-defense is generally intentional behavior. Id. The doctor surmised about how a delusional urge to defend one's self, as opposed to being aggressive and hostile, "could raise at least the argument of diminished capacity." 1RP 96. Further, the doctor conceded that some of Mathes's behaviors were inconsistent with defending himself. 1RP 97. The doctor also conceded that even if Mathes believed he was defending himself that would merely "raise the possibility of a diminished capacity." 1RP 98.

When Dr. Muscatel was asked whether the assaults and kidnapping were intentional acts done in a delusional world, he responded "[p]otentially, yes." The doctor was asked "you would not be able to give an opinion in terms of his ability to form intent, is that right?" 1RP 99. He responded "correct." Id. And, again, he was asked "In terms of those counts, 5, 6, 7 and 8, if I asked you, do you have an opinion if the defendant was able to form intent, your testimony would be you don't have an opinion?" He responded "[t]hat I don't know, correct." Id.

The defense presented Dr. Muscatel in a second offer of proof near

the end of trial. 5RP 625. He had been provided a transcript of Ms. Toste's testimony. 5RP 625. He opined that Toste's testimony reinforced his previous testimony that Mathes has a mental disorder. 5RP 626. He was asked directly whether the disorder would impair Mathes's ability to form the culpable mental state. 5RP 626-27. The doctor said "would it impair him? Yes. Did it impair him? *I don't know*." 5RP 627 (emphasis added). The doctor maintained his original testimony that he would find no diminished capacity with regard to the shootout with police. 5RP 628. At bottom, Dr. Muscatel said that his opinion from his earlier testimony had not changed. Id. "So I still could not offer the opinion that he couldn't form the requisite intent, nor could I offer that he could." Id.

Appended to the state's briefing on the diminished capacity issue is the report of Richard Yocum, Ph.D., a licensed psychologist employed at Western State Hospital. CP 58. Dr. Yocum's 15 page report details his contact with Mathes and his opinions regarding this incident and whether or not Mathes's capacity was diminished. This doctor concluded that"[m]y review of the available information fails to establish that Mr. Mathes' capacity to act intentionally or knowingly was impaired with respect to the alleged offenses." CP 78. Dr. Yocum found that Mathes's own description of the events supported his conclusion, saying "[i]n Mr. Mathes' account he provided numerous instances of acting in a manner that suggests he possessed the capacity to form intent and act in a goal

directed manner to achieve a result." CFP 72. The doctor's forensic application of his opinions was tied to the appropriate legal standard by his reference to "*State v. Atsbeha*, (2001) 142 Wn.2d 904." CP 71.

## IV. AUTHORITY FOR PETITIONER'S RESTRAINT

The authority for the restraint of James Charles Mathes lies within the judgment and sentence entered by the Superior Court of the State of Washington for Kitsap County, on November 6, 2015, in cause number 14-1-00301-1, upon Mathes's conviction of two counts first degree assault while armed with a firearm and against law enforcement, first degree kidnapping domestic violence while armed with a firearm, two counts of second degree assault domestic violence while armed with a firearm, violation of a court order domestic violence while armed with a firearm, felony harassment domestic violence while armed with a firearm, and second degree unlawful possession of a firearm.

## V. ARGUMENT

### PERSONAL RESTRAINT PETITION STANDARDS

"Collateral relief undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders." *In re Hagler*, 97 Wn.2d 818, 824, 650 P.3d 1103 (1982). Mathes must prove error by a preponderance of the evidence. *In re Crow*, 187 Wn. App. 414, 420-21, 349 P.3d 902 (2015). Then, if he

is able to show error, he must also prove prejudice. *Crow*, 187 Wn. App. at 421. Constitutional error must have resulted in actual and substantial prejudice. *In re Woods*, 154 Wn.2d 400, 409, 114 P.3d 607 (2005). "Actual and substantial prejudice, which 'must be determined in light of the totality of circumstances,' exists if the error 'so infected petitioner's entire trial that the resulting conviction violates due process.'" *Crow*, 187 Wn. App. at 421 (*quoting In re Music*, 104 Wn.2d 189, 191, 704 P.2d 144 (1985)).

If the error is nonconstitutional, the petitioner must meet a stricter standard and demonstrate that the error resulted in a fundamental defect which inherently resulted in a complete miscarriage of justice. *In re Schreiber*, 189 Wn. App. 110, 113, 357 P.3d 668 (2015) (subsequent Habeas Corpus proceedings not cited). This standard requires more than a "mere showing of prejudice." *In re Davis*, 152 Wn.2d 647, 672, 101 P.3d 1 (2004).

These showings must be supported by particular facts that, if proven, would entitle Mathes to relief and these factual allegations must be based on more than speculation and conjecture. RAP 16.7(a) (2); *In re Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086, *cert. denied*, 506 U.S. 958 (1992). Conclusory allegations are insufficient. *Cook*, 114 Wn.2d at 813-14. The petition should be denied absent a prima facie showing of either actual and substantial prejudice or a fundamental defect. *In re Yates*, 177

Wn.2d 1, 17, 296 P.3d 872 (2013). If this showing is made, but the record is insufficient, a reference hearing may be ordered. 177 Wn.2d at 18.

"Simply revising a previously rejected legal argument…neither creates a 'new' claim nor constitutes good cause to reconsider the original claim." *In re Jefferies*, 114 Wn.2d 485, 488, 789 P.2d 731 (1990). Thus, a "petitioner may not create a different ground [for relief] merely by alleging different facts, asserting different legal theories, or couching his argument in different language." *In re Lord*, 123 Wn.2d 296, 329, 868 P.2d 835 (1994) (alteration added), *quoting Campbell v. Blodgett*, 982 F.2d 1321 (9th Cir. 1992) *rehearing denied, amended and superseded*, 997 F.2d 512 (9th Cir. 1993); *accord In re Gentry*, 137 Wn.2d 378, 388, 972 P.2d 1250 (1999) ("Personal restraint petitioner must raise new points of fact and law that were not or could not have been raised in the principle action."). "A successive petition seeks "similar relief" within the meaning of RAP 16.4(d) if it raises matters that have been previously heard and determined on the merits." *Matter of Ball*, 187 Wn.2d 558, 565, 387 P.3d 719 (2017).

If an issue has been "raised and rejected on direct appeal" it may not be renewed unless the interests of justice require that it be relitigated. *In re Davis*, 152 Wn.2d 647, 671, 101 P.3d 1 (2004) *(footnotes omitted).* Reexamination of an issue serves the interests of justice if there was "an

intervening change in law or some other justification for having failed to raise a crucial point or argument in the prior application." *Davis*, 152 Wn.2d at 671, n. 15.

**INEFFECTIVE ASSISTANCE STANDARDS**

Each of the claims in the supplemental brief raise the issue of ineffective assistance of counsel. A claim of ineffective assistance is reviewed de novo. *State v. White*, 80 Wn.App. 406, 410, 907 P.2d 310 (1995).

To establish ineffective assistance of counsel, a defendant must show both deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Mathes must "overcome a strong presumption that counsel's performance was reasonable." *State v. Breitung*, 173 Wn.2d 393, 398, 267 P.3d 1012 (2011). Such claims are addressed as follows:

> A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. "The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances."

*In re Nichols*, 151 Wn. App. 262, 272-73, 211 P.3d 462 (2009) (internal citation omitted). Further, Mathes "must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct of counsel." *State v. Dhaliwal*, 150 Wn.2d 559, 573, 79 P.3d 432 (2003).

### A. THE FACTS DO NOT ESTABLISH THAT IT WAS INEFFECTIVE ASSISTANCE OF COUNSEL TO NOT TO MOVE TO CONTINUE THE TRIAL UPON THE FILING OF AN AMENDED INFORMATION WHICH ADDED CHARGES.

Mathes argues that ineffective assistance of counsel arose when counsel failed to move for continuance after the state amended the information near the trial date. This claim is without merit because it lacks factual support.

Mathes correctly notes that the first amended information was filed near the trial date and that that information added charges. From that fact alone, Mathes supposes that the defense had never been advised of further potential charges. He supposes that the defense ignored the breath of this crime spree and was unaware that before that date "the state knew all the allegations." Supp. Brief at 26. But the record contains no information proving by preponderance or otherwise that Mathes was placed in a Hobson's choice between speedy trial and prepared counsel.

In fact, as Mathes points out in the second issue here presented (argument §B below), Mathes and the defense team met with the prosecutor at which time he was told that trial would likely result in far more time than the amount that would be recommended in a plea bargain. Petitioner's exhibit G. This alone is an indication that Mathes was aware of further charges well before the trial date.

Neither Mathes nor counsel objected when arraignment was had on the amended information. RP, 10/19/15, 6. This allows a rational inference that the additional charges were no surprise to the defense. The fact that the amended information was filed following the last failed effort to settle the case is consistent with many thousands of criminal cases where the state may have preferred to amend to the bargained charges. Moreover, that there were in fact plea bargain discussions still proceeding near to the trial date is an indication that there was open and continuing communication between the parties.

The lack of objection on this issue distinguishes the present case from *State v. Michielli,* 132 Wn.2d 229, 937 P.2d 587 (1997). That case proceeded quickly from arraignment in September, 1993, to a trial date in November, 1993, where the issue decided arose. There, the amended information was filed three days before trial. 132 Wn.2d at 233. The trial court allowed the amendment "[o]ver Defendant's objection." Id.

(alteration added). In response, Micheilli had to waive speedy trial to get a continuance.

After that, defense counsel moved to dismiss the additional charges. The trial court granted the motion pursuant to CrR 8.3(b) "in the furtherance of justice." 132 Wn.2d at 234. Thus the Supreme Court framed the issue as can the dismissal be sustained under CrR 8.3(b). Under the court's analysis, the answer was yes in that case.

The *Michielli* court noted that a prosecutorial mismanagement dismissal under CrR 8.3(b) require showing both (a) arbitrary action or governmental misconduct, which misconduct may include simple mismanagement, and (b) resulting "prejudice affecting the defendant's right to a fair trial." 132 Wn.2d at 239-40. It falls to the defense to raise and prove sufficient grounds for dismissal. Id. at 243. In the case, it was noted that CrR 2.1 allows the state to amend at any time before verdict provided that such amendment does not prejudice a substantial right of the defendant. In this manner, the analysis came full circle back to the required showing of prejudice under CrR 8.3(b). *Micheilli,* 132 Wn.2d at 244.[3] It was held that "Defendant was prejudiced in that he was forced to waive his speedy trial right and ask for a continuance to prepare for the

[3] The defense has the burden of showing mismanagement and prejudice by a preponderance of the evidence. *State v. Puapuaga,* 164 Wn.2d 515, 520, 192 P.3d 360 (2008).

surprise charges brought three business days before the scheduled trial." Id.

On the trial date in the present case, Mathes articulated no such prejudice. He did not offer to waive speedy trial in order to gain a continuance. Neither he nor his attorney made any showing that the amended charges in the present case were "surprise charges." The issue asserted here was simply not extant in the trial court; or at least is completely unpreserved.

The same can be said for Mathes's reliance on *State v. Brooks*, 149 Wn. App. 373, 203 P.3d 397 (2009). That is, the facts and circumstances of that case are distinguishable from the present case. There, the state was properly assailed for discovery violations, withholding a large amount of material information. Continuances had been granted over the discovery issues. At a dismissal hearing the defendants argued that they were being placed in the position of choosing between prepared counsel and speedy trial. The *Brooks* court affirmed the trial court's finding of mismanagement and prejudice. Id at 390-91.

In the present case, the defense did not allege any discovery violations. In the present case, the defense made no record of a Hobson's choice between speedy trial and prepared counsel. The defense answered ready to the first amended information. The trial court was not apprised

that the first amended information prejudiced the fairness of the trial and was therefore not tasked with exercising its discretion.

This issue is speculative and not based on sufficient proof to satisfy petitioner's burden. Under these circumstances, with no showing of prejudice, a defense motion to dismiss would have been unavailing. *See State v. Rohrich,* 149 Wash.2d 647, 649, 71 P.3d 638 (2003) ("dismissal under CrR 8.3(b)... requires a showing of not merely speculative prejudice but actual prejudice to the defendant's right to a fair trial"). The record does not establish that counsel's performance was deficient. This issue fails.

### B. MATHES DOES NOT CARRY HIS BURDEN OF ESTABLISHING THAT COUNSEL PROVIDED HIM WITH INADEQUATE ADVISE IN PLEA BARGAINING.

Mathes next claims that counsel was ineffective during negotiations for not noting an incorrect offender score, not advising him of the consequences of conviction after trial, and not fully explaining the consequences of firearm enhancements. These claims focus on information exchanged by the parties during plea negotiations. Mathes separately argues that counsel was ineffective at sentencing, noting there that sentencing proceeded under an erroneous offender score. *Infra* §G.

But the claim regarding plea negotiations is without merit because it lacks factual support.

Here, Mathes found an offender score calculation error in an email from the prosecution to the defense. Petitioner's exhibit C. He found criminal history information in defense counsel's file. Petitioner's exhibit D. He alleges that defense counsel's sentencing calculation in communication with the state was in error. Petitioner's exhibit G.

From these facts, Mathes leaps to the conclusion that defense counsel failed to advise him properly regarding plea negotiations. As the state intimated at sentencing, many more charges could have been lodged. RP, 11/6/15, 6. As the case proceeded, the parties, as is usual, continued to push around the possible charges and sentencing ranges in an attempt to settle the case. The state had a number of years in mind and considered various combinations of charges in order to get to that number. These were preliminary discussions which unfortunately failed to settle the case.

Moreover, the exhibit that Mathes says shows defense counsel miscalculating the sentencing points (exhibit G) is an undated and unattributed communication <u>to</u> defense counsel (the salutation "Ron" appears to be <u>to</u> defense counsel Ron Ness). The evidence asserted by Mathes does not establish the claim.

Even less factual support is found for the claim that defense

counsel failed to advise Mathes with regard to firearms enhancements. The state can find no assertion of facts that establishes that this advice was not given. In fact there are items in the record that cut the other way.

First, there is no assertion here that Mathes did not understand the charges when he was arraigned on them. The first amended information, that Mathes includes here, charges in count one first degree assault with a "Special Allegation—Armed with Firearm." Under that heading, the following appears:

> (MINIMUM PENALTY—if the Defendant is found to have been armed with a firearm at the time of the commission of the crime, an additional sixty (60) months is added to the presumptive range for the first offense…

CP 92; Petitioner's exhibit B. Similar language is appended to each count (the number of months changes depending on the charge). Thus from the time of charging, Mathes knew that there were firearms enhancements and he knew the duration of those enhancements.

Further in Mathes's presentation, he includes defense investigative reports that memorialize negotiations in the case. When Mr. Ness and Mr. Harris met with Mathes on September 24, 2015, Mathes exhibited his understanding of firearm enhancements by asserting that he does not want a first degree assault with the enhancement so that he might get good time. Again, when the defense met with Mathes with the chief criminal

prosecutor, he makes the same pitch, trying to get rid of first degree assault to allow more good time. Although this second meeting does not so much highlight Mathes's understanding of firearm enhancement, it does show his general understanding of sentencing.

Mathes fails to present sufficient facts to sustain the claims in this part of his argument. The available facts show his defense team was engaged in on-going negotiations, that he was legally advised about firearm enhancements by the information, and that Mathes himself was included in the negotiations and had understanding of the sentencing issues. This issue fails for lack of preservation and lack of proof.

And, finally, since Mathes rejected the efforts to settle the matter, it is difficult to find prejudice. The state advised Mathes in person that it would not come off the first degree assault with firearm enhancement. He was directly told that trial would result in a very long sentence if convictions were had. He was fully informed and made his personal choice to proceed to trial. No prejudice is proven.

### C. THE EVIDENCE THAT DEFENSE COUNSEL FAILED TO OFFER WAS INADMISSIBLE, LACKED PROBATIVE VALUE, AND WAS POTENTIALLY VERY PREJUDICIAL TO THE DEFENSE.

Mathes next claims that counsel was ineffective for making

various evidentiary errors. First, it is claimed that counsel was deficient because he did not assert that all of Mathes's statements were admissible to show his state of mind at the time of the incident. This deficiency, claims Mathes, undermined his right to present a defense. This claim is without merit because the facts Mathes wants to have been presented were inadmissible and likely prejudicial.

Here, Mathes is arguing that there are various facts that with hindsight he thinks should have been admitted. It further appears that the facts in particular that he would have wanted admitted were:

--that deputy Dawson could have testified to his historical knowledge of Mathes, including a drug overdose some months before the incident, that his girlfriend gave him an STD, that his mother wanted to kill him, and that he had drugs in his car; (Supp. Brief at 10-11)

--that a lay witness, Norm Reinhardt, could have testified about Mathes's "fragile mental health and dubious ability to formulate intent"; (Supp. Brief at 11)

--that the victim, Ms. Toste, should have testified as to her attempts to rescind the no contact order and how Mathes began acting weird after doctors switched his medication. (Supp. Brief at 11).

The argument is that since all of the listed testimony is admissible

as state of mind evidence, counsel was ineffective for not getting it in.

ER 803(a)(3) provides

> Then Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Mathes asserts that this rule allows the above-listed evidence. But he does not address the salient words "then existing." As a famous commentator on Washington evidence observes

> The instant rule is concerned only with statements describing the declarant's then-existing state of mind or bodily condition. Statements describing a previous state of mind or bodily condition—termed statements of memory or belief—are not admissible under the instant rule.

Tegland, K., Courtroom Handbook on Washington Evidence, 2017-2018 Ed., Vlm. 5D, p. 403, Thomson Reuters, 2017. The evidence that Mathes claims counsel was ineffective for not seeking to admit does not meet the rule. That a witness "watched him devolve in the year prior to the incident" is precisely the sort "previous" mental state to which the hearsay exception does not apply. Supp. Brief at 33.

The flaw in the argument is that it assumes that a mental health defense was before the jury. Mathes puts the cart before the horse. He argues that the evidence would have supported a diminished capacity

defense; but he did not have a diminished capacity defense. The argument assumes that Mathes's diminished mental state at times other than during this incident was relevant because it would serve to bolster his diminished capacity defense. That is, the exception under ER 803 is, as with all the exceptions, providing that if there is a purpose other than for the truth of the matter out-of-court statements may be admitted. And, perhaps, there's an argument to be made that historical evidence of prior mental states may be probative of the diminished mental state at the time of the incident thus providing a purpose other than the truth of the matter.

Moreover, here Mathes merely speculates that Dr. Muscatel did not know of this historical mental state evidence, did not know of the opinions of lay witness, did not know that Mathes long suffered from substance abuse problems, and did not know that Ms. Toste may have observed bizarre behavior or ideation at some time before. Nothing in the record proves by a preponderance that Dr. Muscatel did not know and consider these facts.

Mathes does not explain his remark that such evidence was "directly relevant" to the question of whether or not on this occasion he had intent to inflict the requisite level of harm. Supp. Brief at 31. It still remains that evidence tending to show Mathes's state of mind at any time before this incident simply does not prove his state of mind at the time of

the incident.

The cases Mathes relies on in this section are about that very thing. The proposition established in *Ramm* and *Toth* is that when a mental health defense is in fact used, the less-than-rational prior remarks of the allegedly diminished or insane defendant may be probative with regard to that defense. Lacking the mental health defense, it is unlikely that the proposed testimony was relevant. Absent the defense, the fact that a year before Mathes behaved in any particular manner does not serve to make any proposition in the case more or less likely. ER 401.

Mathes argues that he should have gotten a diminished capacity instruction. But he did not. Evidence that would be admissible only for the purpose of supporting that defense is otherwise irrelevant. Defense counsel was neither "lame" not deficient in his understanding of this aspect of the law of evidence.

Further, Mathes claims that the lay witness, Norm Reinhardt, could have testified to Mathes's "fragile mental health and dubious ability to formulate intent." The state cannot find information in the record that would provide foundation for such opinions. How is it that Mr. Reinhardt was qualified to render such opinions? Mathes does not say. Although a lay witness may testify with regard to the mental state of the defendant, such testimony is narrowly circumscribed. A lay witness may not testify

as to whether or not diminished capacity resulted in an inability to form specific intent. *See State v. Thamert*, 45 Wn. App. 143, 148, 723 P.2d 1204 (1986), *overruled State v. Ellis*, 136 Wn.2d 498, 963 P.2d 843 (1998) (overruled with regard to the application of the *Edmon* factors in deciding admissibility of diminished capacity defense); *see also State v. Ellis*, *supra*, at 521 ("To maintain a diminished capacity defense, a defendant must produce expert testimony demonstrating that a mental disorder, not amounting to insanity, impaired the defendant's ability to form the specific intent to commit the crime charge.").

It is true that a criminal defendant has the right to present a defense. *See State v. Starbuck*, 189 Wn. App. 740, 750, 355 P.3d 1167 (2015), *review denied*, 185 Wn.2d 1008 (2016). However, "Although the accused enjoys the right to present a defense, the scope of that right does not extend to the introduction of otherwise inadmissible evidence." *State v. Farnworth*, 199 Wn. App. 185, 206, 398 P.3d 1172, (2017) *review granted* 190 Wn.2d 1007 (appellant's *review denied*; state's cross-petition granted), *citing State v. Aguirre*, 168 Wn.2d 350, 362-63, 229 P.3d 669 (2010). More particularly, "An accused does not have a right to offer incompetent, privileged, or otherwise inadmissible evidence under standard rules of evidence." *Farnworth*, 199 Wn. App. at 206, *citing Taylor v. Illinois*, 484 U.S. 400, 410, 108 S.Ct. 646, 98 L.Ed.2d 798

(1988). Moreover, and particular to the present procedure, a personal restraint petitioner may not rely on inadmissible hearsay to establish her claim. *In re Scheiber, supra,* 189 Wn. App. at 670.

Finally, as to the statements Mathes made after being shot and at the hospital. He claims that such would have assisted in establishing his lack of the requisite intent. The statements are much closer to the mark with regard to the exception in ER 803(a)(3). His mental state at the time of the shooting was admissible and his post-shooting and hospital bed remarks may have cast light on that issue. However, eliminating hindsight and considering trial tactics overcomes the proposition that simply because an item of evidence can be admitted it should be admitted.

Defense counsel will always be shy of admitting evidence that her client may have uttered some bizarre statements. But in this case there is more. Dr. Muscatel could not opine diminished capacity with regard to counts 1, first degree assault, 2, first degree assault, 3, first degree assault, and 4, second degree assault. 1RP 92. This because his acts of taking a shooting stance and firing at the officers appear to be purposeful behavior. Moreover, as noted above, the doctor conceded that acting in self-defense is generally intentional behavior. 1RP 95. Saying that 'I shot at them in order to harm myself' has the effect of confessing that you shot at them and admitting that you did so on purpose—intentionally.

Most of Mathes's hospital statements cut the same way. His belief that his girlfriend was cheating on him provides motive for his actions and threats against her. If it is true that he had overdosed several months before, that statement does not show delusional thinking on the occasion of the incident. Similarly, his concern that Mr. Trent, Ms. Toste's husband, might be angered that Mathes was having sex with his wife does not on the face of it seem all that irrational. In sum, the decision on whether or not to seek or suppress such evidence must be left to the tactical decisions of counsel.

Moreover, counsel obviously knew that he did not have a diminished capacity defense that Mathes's statements might have supported. Under such circumstances, it is not a deficient tactic to try to avoid evidence that admits that Mathes acted on purpose and with motive to harm Ms. Toste. After that, evidence about his mother's supposed insurance policy or there being people under the house does not seem to be probative of much.

Finally, no prejudice is shown because Mathes got evidence that provided him an argument. This court's review of the facts on direct appeal shows that Mathes (a) was genuinely concerned whether anyone got hurt, (b) asserted that if anyone was hurt, it was an accident, (c) was not trying to hurt a cop but rather himself (go out with guns-a-blazing), (d)

was happy that Ms. Toste did not get hurt; moreover, defense counsel emphasized this theme on cross. *State v. Mathes*, 197 Wn. App. 1050, (UNPUBLISHED) (not pagination in Westlaw version). And, finally, in closing defense counsel credibly used this evidence to argue against intent. Id. The defense properly attacked the intent elements of the most serious charges.

Effective assistance is not a guarantee of success. The facts of this case were difficult. Counsel used them as he could. There was no deficient performance and no prejudice on this issue.

### D. COUNSEL WAS NOT INEFFECTIVE FOR TACTICALLY NOT OFFERING POTENTIALLY PREJUDICIAL EVIDENCE.

Mathes next claims that counsel's evidentiary errors extend to counsel's attempt to suppress some of Mathes's statements. The claim is difficult in that Mathes argues that counsel was in error for attempting to suppress evidence that Mathes then admits counsel used to argue his case. This claim is without merit because, as the court of appeals decided on direct appeal, the performance of defense counsel on this point was tactical.

The review of possible prejudice immediately above applies here. That review makes it difficult to figure what relief Mathes wants. Should

counsel have moved to suppress Mathes's "nighttime ramblings" or not? If counsel, by Mathes's lights, should have moved to suppress, he did and there is no relief. If he should not have moved to suppress, then he was correct in later having a flexible trial strategy and using the evidence to argue against intent.

At bottom, this issue turns on a matter of opinion. Mathes argues that counsel's performance resulted in the "exclusion of valuable helpful evidence…" Brief at 39. Again, absent a diminished capacity defense, the nighttime ramblings of Mathes, after the event, prove little or nothing. Absent a mental health defense, ideation that someone is out to get him or that his own mother is plotting to kill him has little or nothing to do with the question of his mental state when he levelled a firearm at law enforcement officers and pulled the trigger. Such evidence does not explain why he kidnapped Ms. Toste at gun point. His after the fact statements have little if any probative value with regard to the issues in the trial.

A good example of the conundrum that defense counsel was in is the idea that Mathes was after committing suicide by cop and therefore did not intend to hurt the officers. But as has been seen, such evidence tends to prove that Mathes fired on purpose—intentionally—in order to get the police to kill him. It is not clear that evidence that Mathes now finds to be

valuable and helpful would have appeared that way to trial counsel. It goes to Mathes's mental state but was likely a double edged sword.

This is the essence of trial tactics. Difficult cases occasion difficult decisions. This is also at the heart of the admonition that hindsight and second guessing should not control the question of effective assistance. Trial counsel made tactical decisions in a hard case and of course those decisions can be second-guessed. But those decisions do not rise to the level of deficient performance. This issue fails on the first prong of the ineffective assistance test.

### E. THE POST-CONVICTION EXPERT OPINION IN THIS MATTER DOES NOT WARRANT A NEW TRIAL AND THE RECORD DOES NOT SUPPORT THAT THE TRIAL EXPERT WAS POORLY OR IMPROPERLY PREPARED.

Mathes next claims that counsel was ineffective for failing to adequately prepare the expert witness. Mathes alleges that trial counsel failed to give the witness historical mental health records, failed to explain the law to the witness, and failed to properly argue the appropriate legal standards. He supports this argument by including the results of post-conviction expert shopping: a Ph.D. who criticizes Dr. Muscatel's work and conclusions. This claim is without merit because the late

psychological evaluation does not meet the test for newly discovered evidence and thus does not warrant a new trial and because there is insufficient factual support for the allegations directed at defense counsel.

***1. Dr. Barnard's opinion on diminished capacity does not warrant a new trial.***

First, Mathes does not characterize the new psychological opinion. That is, he should provide the court with a newly discovered evidence analysis. He does not. The cases on newly discovered evidence do not favor consideration of Dr. Barnard's opinion.

Mathes is allowed new evidence: The Rules of Appellate Procedure provide that new evidence may be grounds for relief from personal restraint. RAP 16.4(c)(3). Relief may be given if "[m]aterial facts exist which have not been previously presented and heard, which in the interests of justice require vacation of the conviction, sentence, or other order…" Id. (alteration added).

"When raised as a ground for relief in a personal restraint petition, newly discovered evidence is subject to the same standards that apply to a motion for a new trial." *In re Copeland*, 176 Wn.App. 432, 450, 309 P.3d 626 (2013) *revue denied* 182 Wn.2d 1009 (2015); *citing In re Benn*, 134 Wn.2d 868, 886, 952 P.2d 116 (1998) (*quoting In re Pers. Restraint of Lord*, 123 Wn.2d 296, 319, 868 P.2d 835 (1994)). In

*Copeland,* PRP petitioner asserted new expert opinions that the victim of his murder conviction had actually shot himself. Id. His burden on the new evidence was to show "that the evidence was discovered after trial and could not have been discovered before trial in the exercise of due diligence." The court applied precedent that established the rule that "[a] new expert opinion, based on facts available to the trial experts, does not constitute newly discovered evidence that could not, with due diligence, have been discovered before trial." *Copeland,* 176 Wn.App. at 451 (alteration added) *citing State v. Harper,* 64 Wn.App. 283, 293, 823 P.2d 1137 (1992).

*Harper* is much like the present case. There, a conviction for attempted first degree murder was subject to direct appeal and personal restraint petition at the same time. 64 Wn. App. 294. In the PRP part of the case, Harper argued that his counsel was ineffective for failing to establish a diminished capacity defense. He supported that argument by the assertion of a new psychological opinion.

Harper had accosted a girl on the street and attempted to drag her into the bushes ostensibly with intent to rape her. She struggled, they fought, and Harper cut her in the neck repeatedly with a razor knife. His trial expert offered to testify that Harper was an anger rapist and that such rapists do not premeditate. But Harper was not charged with rape and the

trial court therefore ruled that the evidence was irrelevant. Id. at 287-88.

Part of Harper's ineffective assistance claim was that his counsel should have known that the anger rapist expert's testimony did not establish diminished capacity. Id at 288.[4] Harper argued that it was ineffective for counsel to not properly assert a diminished capacity defense because the expert's testimony

> described a classification of behavior, not a mental disorder, because Dr. Marra failed to give an opinion as to Harper's inability to form a premeditated intent to kill, because he testified to Harper's mental state at the time he pulled the victim off the road rather than at the time he cut her; and because he failed to explain how being an "anger rapist" causes an inability to form the requisite intent.

64 Wn. App. at 289.

A rather long-winded holding disposed of much of Harper's argument.

> In his personal restraint petition, Harper argues that trial counsel's failure to obtain an expert opinion supporting diminished capacity, such as Dr. Petrich's opinion obtained by appellate counsel discussed below, constitutes ineffective assistance of counsel. Harper has not shown deficient performance by trial counsel. Dr. Marra, the expert obtained by Harper's original counsel and retained by trial counsel, was qualified to evaluate Harper and render an opinion. Dr. Marra did so, and concluded **1142 that Harper did not meet the standards for a diminished capacity defense. In effect, Harper's argument is that trial counsel's performance was deficient because he did not continue seeking out expert opinions until he found an expert who was willing to opine that Harper did meet the diminished capacity standards. However, he makes this argument with the post hoc knowledge that such an

[4] Under the now defunct *Edmon* factors.

> expert existed, but was not consulted until after the trial. We disagree that counsel's failure to consult additional experts fell below the objective standard of reasonableness.

64 Wn. App. at 290.

Not finding ineffective assistance, the *Harper* court moved on to consider the effect of the new psychological opinion. The court held that the new evidence is to be subjected to the five part newly discovered evidence test that the Supreme Court had announced. Newly discovered evidence may warrant a new trial if

> 1) The evidence must be such that the results will probably change if a new trial were granted;
>
> (2) The evidence must have been discovered since the trial;
>
> (3) The evidence could not have been discovered before the trial by exercising due diligence;
>
> (4) The evidence must be material and admissible; and
>
> (5) The evidence cannot be merely cumulative or impeaching.

*Harper*, 64 Wn. App. at 291, *citing State v. Williams*, 96 Wash.2d 215, 223, 634 P.2d 868 (1981); *see also State v. Fero*, 190 Wn.2d 1, 409 P.3d 214 (2018) (applying same five factor test to similar issue). Armed with that test, the court held that the assertion of the new expert opinion in that case did not meet the newly discovered evidence test and thus did not warrant the granting of a new trial. Id. at 293.

The *Harper* court first quoted from another post-conviction new expert opinion case:

> In sum, this strikes us as a classic case: the defendant loses, then

> hires a new lawyer, who hires a new expert, who examines the same evidence and produces a new opinion. We cannot accept this as a basis for a new trial.

*Harper* 64 Wn. App. at 293, *quoting State v. Evans*, 45 Wn.App. 611, 614–15, 726 P.2d 1009 (1986). In the same vein, the *Harper* court further quoted a concurring opinion in *Evans*

> What we have in the instant case is, purely and simply, a question of expert witness competency. Experience has taught us that such "experts" rarely agree. What may be a crucial "fact" to one, may not be to another.
>
> Before affirming the grant of a new trial because the defense expert presented at trial overlooked or thought unimportant a fact or facts now deemed pertinent by an expert who *294 did not testify, we must ask whether all of those defendants who could now unearth a new expert, who finds "new facts"—which if believed by the same jury might cause them to acquit—were denied a fair trial, i.e. failed to receive substantial justice. Surely we have to answer in the negative, or finality goes by the boards and the system fails.

64 Wn. App. at 293-94 *quoting State v. Evans*, 45 Wash.App. at 617–18, 726 P.2d 1009 (Reed, J., concurring).

It was held that a new expert opinion based on the same facts "does not constitute material facts not previously heard." Id. at 294. Moreover, at least one subsequent opinion characterized *Harper* as holding that "the failure to request a diminished capacity instruction is not ineffective assistance where the expert's opinion would not satisfy the standards for the diminished capacity defense." *State v. Powers*, 200 Wn. App. 1023, __P.3d __ (2017) (UNPUBLISHED AND UNBINDING).

Finally, Dr. Barnard opines that Mathes's capacity was diminished in part due to his "high level of intoxication." Petitioner's exhibit G, Dr. Barnard's report at 19. This finding is based completely on Mathes's self-report of his level of intoxication at somewhere around two AM. *See* argument section F *infra*. The shooting is more than 10 hours away, the assault of his father is as far away, and Mathes continues to hold Ms. Toste against her will right up to the time of the shooting. *See State v. Classen*, (No. 49762-0-II), __ Wn. App. __, 422 P.3d 489 (July 24, 2018) (kidnapping is a continuing offense). Just as with the issue of failure to request a voluntary intoxication instruction, Dr. Barnard has inadequate information to support the connection he makes between Mathes's mental state and intoxication.

***2. Ineffective Assistance is not shown.***

The foregoing establishes that Dr. Barnard's opinion that Mathes suffered diminished capacity does not itself warrant a new trial. But the claim here is that Mr. Ness, not Dr. Muscatel, was ineffective. Mathes claims that defense counsel should have given the doctor more material, correctly advised him on the law, and given a winning argument to the trial court on admissibility of the defense.

Dr. Muscatel is a licensed clinical and forensic psychologist. 1RP 76. He is a neuropsychologist and a forensic psychologist. 1RP 76-77.

He has worked on "thousands of cases" including 600 homicide cases in a 30-plus year career. 1RP 77.

The doctor was familiar with the mental health history of Mathes. Id. at 79. He indicated his awareness of prior bipolar diagnoses, prior posttraumatic stress diagnoses, and prior schizophrenic diagnoses. Id. The doctor did not find schizophrenia in Mathes's presentation, felt the posttraumatic stress was related to his then present circumstances, and thought that bipolar disorder was the most accurate diagnosis. Id. The doctor found Mathes to be in moderate psychological distress; Mathes was "certainly not psychotic in his presentation to me." 1RP 80.

Dr. Muscatel testified as to his understanding of the diminished capacity defense. 1RP 84. He correctly noted that diminished capacity involves "being unable to form the specific requisite intent." Id. He correctly noted that the defense goes to whether a person intended to do the act; whether they were capable of intention. Id. He opined that answering this question depends on the facts of what happened but diminished capacity may arise from distorted thinking or the effects of drugs and alcohol. 1RP 84-85.

The doctor discussed the distinction between intent to assault and the intent to defend oneself. 1RP 85. He noted that this is a difficult line to cross and that there needs to be "a lot of evidence for that." Id. He believed that the only way diminished capacity could possibly apply in the

case was as "some bizarre version of self-defense." 1RP 86-87. The doctor had no doubt that Mathes suffered from a mental disorder with symptoms including paranoia and auditory hallucinations. V(5)RP 626

From this brief review of Dr. Muscatel's testimony, it can be asked what information about the law of diminished capacity defense counsel failed to provide to the doctor. The doctor seems to have it right. Moreover this is unsurprising given the scope of Dr. Muscatel's experience. Mathes here simply does not say anything about the relationship and discussions between defense counsel and Dr. Muscatel. Moreover, it is not the forensic expert's want to give the court a detailed analysis of caselaw. His general, and accurate, understanding of the principles involved suffice.

But Mathes assails defense counsel for failing to provide particular historical mental health records. First, it should be noted that as we have argued in this matter, the historical information does not itself establish conforming mental states on the day in question—thus Dr. Muscatel's correct assertion that much depends on what happened during the incident. Second, Dr. Muscatel, as is part of his job, considered and rejected historical diagnoses including schizophrenia and posttraumatic stress disorder. He found the current presentation to be more accurately diagnosed as bipolar disorder.

Mathes goes on claiming that defense counsel failed to prepare the

doctor to testify. He never tells us either what Mr. Ness told Dr. Muscatel or what he did not tell him. He simply assumes that since Dr. Muscatel failed to opine diminished capacity without qualification he must not have been advised on the law. Interestingly, in the case that Mathes asserts shows that defense counsel did not adequately argue the law, *State v. Mitchell,* 102 Wn. App. 21, 997 P.2d 373 (2000), the expert witness was Dr. Muscatel. *See also State v. Rice,* 110 Wn.2d 577, 592-93, 757 P.2d 889 (1988) (Dr. Muscatel appointed by trial court on issues of competence and sanity in aggravated murder prosecution thirty years ago.) Thus Dr. Muscatel clearly knew the law of diminished capacity.

But did defense counsel? First, he hired an expert. Defense counsel clearly knew that assertion of a diminished capacity or other mental defense required an expert opinion of a mental disorder.

Further, the *Mitchell* matter is not such a clear bit of authority on the point that defense counsel was deficient for not arguing it. First, the matter was destined to be reversed because between trial and appeal the *Edmon* test for admissibility of diminished capacity evidence was discarded. 102 W. App. at 26. Second, the issue of what capacity was diminished was much more circumscribed than in the present case. There, the single issue raised was whether or not Mitchell's delusional state negated his capacity to understand that the people he assaulted were police officers, an essential element of the state's proof.

Recently, a denial of the diminished capacity defense was affirmed because, much like the present case, the expert was unable to establish a causal connection from the diagnosed mental disorder to criminal intent. *State v. Chamberlain,* 2 Wn. App.2d 1011, __ P.3d__ (January 22, 2018) (UNPUBLISHED AND UNBINDING). Chamberlain asserted a diagnosis of borderline personality disorder and opinion of a psychologist that he may experience "*dissociation*" at times. Id. at §3 (emphasis by the court).

The *Chamberlain* court made the distinction that Mathes does not make between the test for admissibility of expert testimony generally and the particular prima facie showing necessary for the diminished capacity defense in a particular case. Id. at §4. The question of admissibility under ER 702 is different than the question of whether or not a defendant presented "sufficient evidence to support each element of the defense." Id. Further, "*Ellis*[5] and *Mitchell* do not hold that testimony about the defendant's mental disorder is enough to support a diminished capacity defense without some expert testimony showing a causal connection to intent." Id.

In the present case, defense counsel could have argued the admissibility rule under ER 702 as much as he wanted. But this would not change the fact that he could not establish the elements of the diminished

[5] *State v. Ellis,* 136 Wn.2d 498, 963 P.2d 843 (19198).

capacity defense. As was held on direct appeal, the defense lacked a forensic application or, in the words of *Chamberlain,* a causal connection. This court on direct appeal put it succinctly: "However, Dr. Muscatel did not render an opinion that Mathes may have had a diminished capacity to *act intentionally*, rather he offered the possibility that Mathes, while acting intentionally, may have had a diminished capacity to *comprehend* that he did not need to act in self-defense." 197 Wn. App. 1050 (ftnt. 5).

Niether the law nor the record support the claims regarding diminished capacity.

### F. THE FACTS DO NOT SUPPORT A VOLUNTARY INTOXICATION INSTRUCTION.

Mathes next claims that counsel was ineffective for failing to assert a voluntary intoxication defense instruction. This claim is without merit because, as the court of appeals decided on direct appeal, the evidence in the case did not provided sufficient facts to warrant the giving of such an instruction.

Mathes here drives right past the trial evidence on his way to arguing his long history of problems with substance abuse. But arriving at that history does not change the analysis. Mathes may well have struggled mightily with addictions on most days of his adult life. But the issue addressed here is whether or not there was substantial evidence to support

the giving of the instruction from the day of Mathes's crime spree; not whether he was an addict but whether he was under the influence at the relevant time.

As it did on direct appeal, this issue turns on a review of the record looking to find evidence of intoxication on the occasion of the crimes, not at some other point in the history of James Mathes. There is only one reference to Mathes using drugs at the time of or near the time of the crimes: Ms. Toste saw him shoot up once early on in the incident. 2RP 213. Early on, when he pulls the gun from beneath the mattress, she testified that he was under the influence "at that time." 2RP 195. But then we can reasonably infer that Mathes was out of drugs; he asked Ms. Toste to get more. 2RP 198. By 2 o'clock in the morning, he is having Ms. Toste seek more drugs from Hannah, her daughter's best friend. 2RP 199 (phone call around 2 a.m., 2RP 251).[6] There are no facts establishing drug intoxication after 2 a.m. and the shooting incident is more than 10 hours away.

No other evidence in the record, let alone "scads of evidence" show any other drug or alcohol use by Mathes during this entire incident. Supp. Brief at 43. This Mathes admits while hastening to add that Ms. Toste could testify that he "had been" using drugs on occasions before this

[6] Mathes verifies that he was out of drugs in the small hours of the morning in his

incident. Supp. Brief at 44. Moreover, the record is in no sense clear that Dr. Muscatel did, or attempted to, premise diminish capacity on voluntary intoxication.

The law with regard to voluntary intoxication is the same now as when Mathes argued his direct appeal. Voluntary intoxication is often referred to as a defense in the cases but provides only that such may be considered on the issue of intent:

> No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his or her condition, but whenever the actual existence of any particular mental state is a necessary element to constitute a particular species or degree of crime, the fact of his or her intoxication may be taken into consideration in determining such mental state.

RCW 9A.16.090. In order to receive an instruction, the defense must show that "(1) the crime charged has as an element a particular mental state, (2) there is substantial evidence of drinking [or drug use], and (3) the defendant presents evidence that the drinking [or drug use] affected [the defendant's] ability to acquire the required mental state." *State v. Everybodytalksabout*, 145 Wn.2d 456, 479, 39 P.3d 294 (2002); *accord State v. Classen*, __ Wn. App. __, 422 P.3d 489 (2018).

The defense has the burden to produce sufficient evidence of intoxication to put the matter in issue in seeking the instruction. *See State*

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statements to Dr. Barnard. Petitioner's exhibit E (Dr. Barnard's report at 13)

*v. Carter*, 31 Wn. App. 572, 575, 643 p.2d 916 (1982). "Substantial evidence is evidence that is sufficient to persuade a fair-minded person of the truth or correctness of the matter." *Pacific Topsoils, Inc. v. Washington State Dept. of Ecology*, 157 Wn. App. 629, 238 P.3d 1201 (2010); *see also State v. Paul*, 64 Wn. App. 801, 806, 828 P.2d 594 ("substantial evidence has been described as evidence sufficient to persuade a fair-minded person of the truth of the declared premise."). "[T]he evidence must reasonably and logically connect the defendant's intoxication with the asserted inability to form the required level of culpability to commit the crime charged." *State v. Gabryschak*, 83 Wn. App. 249, 252-53, 921 P.2d 549 (1996).

These principles were applied in *State v. Kruger*, 116 Wn. App. 685, 67 P.3d 1147 (2003) *rev denied* 150 Wn.2d 1024 (2003). Kruger's conviction was reversed because his counsel failed to request a voluntary intoxication instruction. Id. at 695. Kruger was in fact "drunk." The court found "ample evidence of his level of intoxication on both his mind and body, e.g., his "blackout," vomiting at the station, slurred speech, and imperviousness to pepper spray." Id. at 692. Moreover, "every witness testified to Mr. Kruger's level of intoxication." Id. at 693.

In the present case, we have seen that defense counsel did not argue intoxication in closing. This is easily understood by the lack of

substantial evidence that for the large part of this case Mathes was not in fact intoxicated. On this record, at least 10 hours had passed since Mathes used drugs. And, contrary to *Kruger*, most witnesses failed to remark that he was intoxicated, including his own father. And, finally, the witness called by the defense, Ms. Jones, who observed Mathes close to the time of the shooting, said nothing about intoxication. This is not evidence sufficient to persuade a fair-minded juror of the truth of the premises that Mathes was intoxicated. Moreover, there was certainly no evidence adduced that proved a logical and reasonable connection between intoxication and an alleged failure of Mathes to form intent.

Kruger should have gotten the instruction because he was demonstrably drunk. In *State v. Hackett*, 64 Wn.App. 780, 827 P.2d 1013 (1992), the defendant should have gotten the instruction because he was demonstrably intoxicated on drugs--cocaine. When contacted by police, "Hackett's hand was shaking, his limbs and lips were blue, his general appearance was unkempt, and he looked forward almost the entire time, never looking directly toward Shaw." Id. at 781-82. A forensic toxicologist opined that "Hackett's levels of the cocaine and cocaine metabolites alone were consistent with a lethal level." Id. at 783. Another expert testified that his substantial cocaine use had caused him to hallucinate and that he had no memory of the incident that got him

arrested. Id. at 783-84.

There is no such testimony in this case. Mathes used once late in the night or in the early morning hours long before the shooting. Nor does the assertion of a hospital tox-screen that merely shows methamphetamine on board with Mathes change the analysis. That newly asserted evidence says nothing about the continued effects of the drug many hours after it was ingested. That new evidence does not tell us the level of the drug found or how that figure may relate to the level soon after ingestion. The mere presence of a residual trace of the drug does not prove intoxication by the drug at the time of the crimes. This new evidence does not serve to establish that Mathes had either ingested drugs close to the incident or how the particular drug "affected his ability to acquire the required mental state." *State v. Classen*, __ Wn. App. __, 422 P.3d 489, 498-99, (2018).

Substantial evidence does not support a voluntary intoxication instruction. There is insufficient proof that Mathes was in fact intoxicated. No evidence supports the necessary connection between intoxication and a failure to form intent. The trial court would have been in error in giving such an instruction. Trial counsel did not err in failing to request one. Mathes's ineffective assistance claim fails. Further given the overwhelming weight of evidence against Mathes, if counsel was deficient, his error caused no substantial prejudice.

## G. MATHES SHOULD BE RESENTENCED ON A CORRECT OFFENDER SCORE. COUNSEL WAS NOT OTHERWISE INEFFECTIVE AT SENTENCING (CONCESSION OF ERROR).

Mathes next claims that trial counsel was ineffective at sentencing because sentencing was done quickly after verdict, counsel did not prepare for sentencing, no presentence investigation was undertaken, and the offender score was wrong. The state concedes the last claim and accepts that the matter should be resentenced. The state will therefore not further address the claims regarding the quickness of the sentencing or the lack of a presentence report as those issues, including any attempt to mitigate the sentence on mental illness grounds, may be addressed by defense counsel at resentencing.

With regard to Mathes's criminal history, as noted above, the offender score was incorrect at sentencing. Although Mathes does not tell us why the score is mistaken, the state found that an entry on the criminal history falsely led the parties to believe that a 1992 conviction was a B class felony, in which case it would not have washed out and would have been counted.

In passing, the state takes issue with the bald assertion that Mathes has never been convicted of an A of B class felony. The judgment and sentence that proves the sentencing points error also refers to three juvenile court convictions for second degree burglary, each a B class

felony. Appendix A.

But the offender score is off by one point. Each entry on pages three and four of the judgment and sentence should be reduced by one point. CP 203-04.

The state has the burden of proving the offender score by a preponderance of the evidence. *See State v. Arndt*, 179 Wn. App. 373, 320 P.3d 104 (2014). The listing of the case 92-1-00857-1 as a B class felony conviction was in error. The score should be corrected, and new ranges should be calculated.

### H. CUMULATIVE ERROR DOES NOT WARRANT REVERSAL.

Mathes claims that counsel's many alleged deficiencies establish that an accumulation of errors warrants a new trial. The cumulative error doctrine applies when a combination of errors denies the accused a right to a fair trial when individually the errors combined may not warrant relief. *See State v. Grieff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

The state has herein contested all of the ineffective assistance claims save, perhaps, that defense counsel should have known about the one point error. Obviously, a lack of errors defeats this claim. *See State v. Song Wang,* (No. 76369-5-I) (August 27, 2018). Thus decision of this claim must be deferred until it is established that there was more than one

error in the case.

## I. PRO SE CLAIMS

This proceeding began with the assertion of a pro se petition. Counsel's briefing says that that briefing is but supplemental to Mathes's pro se writing. Insofar as the pro se arguments differ from the arguments of counsel, the state will attempt to address them here. Further, a typed version of the pro se material is attached to counsel's brief. The state will refer to the typed version.

### *1. Abuse of Discretion Diminished Capacity*

This claim is addressed to the exclusion of the diminished capacity defense. Mathes claims that the trial court did not understand controlling law and he proceeds to explain the law controlling diminished capacity. He claims that juror notes show that they were aware of mental illness and substance abuse issues but had no guidance without a diminished capacity instruction. Moreover, the trial court was "in collusion" with the state in excluding Dr. Muscatel's testimony.

Although Mathes's argument here jumps from juror notes to collusion between the state and the trial court to newly discovered evidence and to asserting the defense of self-defense. The argument is essentially the same as the argument asserted on direct appeal and by counsel in the supplemental brief.

As to diminished capacity, the state will rely on its arguments above. The defense was not established as a matter of law and therefore the instruction was properly denied.

The state views the allegation that the trial court was in collusion with the state as spurious, frivolous, and not supported by the record. The state has insufficient evidence to further address that claim.

***2. Ineffective Assistance***

Here, Mathes addresses the facial validity, *vel non,* of the judgment and sentence. Part of this claim is an incorrect offender score. Another part is about his statements and right to remain silent, which, rather confusingly, turns into an argument about voluntary intoxication, his statements to police, and jury instructions. He assails counsel for failing to present the jury with "mitigating circumstances." 13. Then, the argument turns to counsel's deficient performance in not objecting to "perjured" testimony by Ms. Vierra and Ms. Toste.

Taking the last assertion first, nothing in this record shows that either Ms. Toste or Ms. Vierra perjured themselves. Perjury requires a showing that "in any official proceeding he or she makes a materially false statement which he or she knows to be false under an oath required or authorized by law." RCW 9A.72.020. Further,

> "Materially false statement" means any false statement oral or written, regardless of its admissibility under the rules of evidence,

> which could have affected the course or outcome of the proceeding; whether a false statement is material shall be determined by the court as a matter of law;

RCW 9A.72.010.

The claim here supposes that it was material that he picked Ms. Toste up when this incident began, instead of her coming to his house. He claims materiality because it would impeach her and undermine evidence that he abducted her. However, the evidence established that the abduction occurred later. After she arrived, the two had "messed around." 2RP 194. Sometime later Mathes pulled the gun and at that point abducted Ms. Toste. 2RP 195. The method of her arrival has no effect on these facts. Even if she was incorrect in her testimony, that factual issue is simply not material under the facts of the crime.

The state frankly does not understand the paragraph found at the bottom of page 13 and spilling on to page 14 of the type-written version of the pro se submission. It appears that he claims that counsel's trial strategy was deficient because he did not present the jury with voluntary intoxication or diminished capacity instructions.

Of course, one does not present "mitigating factors" to the jury.[7] Moreover, as argued above, nothing about counsel's attempts to establish a diminished capacity defense was deficient. This argument rambles

[7] Unless of course there is a special sentencing proceeding.

through a myriad of factual issues and concludes that "some sort of instruction should at least have been proposed." It very much appears that other than the stock instruction on the jury's role regarding the credibility of the witnesses which was given, there are no such instructions as Mathes wants.

The right to remain silent was properly litigated in the CrR 3.5 hearing held pretrial. No assignment of error here or on direct appeal has questioned his right to remain silent as such. The evidentiary issues in the case revolve around which parts of Mathes's rather complete failure to remain silent (even after being advised of his rights) were or should be admissible.

The issue of a voluntary intoxication instruction has been addressed. It is completely unclear what other instructions Mathes refers to. And, finally, the state has conceded the offender score issue.

***3. Speedy Trial***

Here, Mathes claims that federal rules and American Bar Association standards command that the matter be dismissed. Because those publications are not authority in Washington and because it is not factually accurate, his speedy trial issue fails.

Pro se exhibit 3A, a docket sheet from the district court, shows that on February 11, 2014, he stipulated to defer bindover and thereby agreed

to extend jurisdiction in the district court to February 27, 2014. Next, Mathes asserts his exhibit 3B, a superior court case summary, which indicates superior court arraignment on March 28, 2014, 29 days from the stipulated date. But the district court docket sheet says "Docket continued on next page." On the next page is an entry showing that a second stipulation was entered on February 27, 2014 wherein Mathes agreed to extend his bindover until April 24, 2014. A certified copy of stipulation is attached as appendix B.

Under CrRLJ 3.2.1 (g) (2), under a felony complaint, the court must have a preliminary hearing or bind the matter over to superior court within 30 days. The 30 days runs from filing in district court to filing in superior court. By CrRLJ 3.2.1 (g) (3), this time may be extended by stipulation of the parties. The parties so stipulated. There was no speedy trial violation.

***4. Inconsistent misstatements—Perjured Testimony***

Mathes claims the trial was punctuated by instances of perjury "and or inconsistent or misstated statements." 16. He alleges that Ms. Toste perjured herself about whether or not she was dropped off at Mathes's house or he picked her up. This barely material point (*see argument §I.,2. supra*) is important, says Mathes, because it shows Ms. Toste's general dishonest character which is further evidenced by her

willingness to violate the no contact order that restrains him from seeing her. She is the more dishonest because she knew Mathes was a felon in possession of a firearm and thus was an accomplice in that crime.

Similarly, Mathes impugns Washington State Patrol Detective Green as a perjured witness. Here, Mathes seems to be comparing police incident reports with actual testimony. Detective Green's perjury begins by his being mistaken about what time he arrived at the scene of the shooting. Mathes sees perjury in an inconsistency between whether he pointed a gun at Ms. Toste as he exited his parent's house, as written in reports, or had the gun in his waistband at that time.

Mathes goes on: it is important that Detective Green said it was a secure crime scene when Mathes says it was not. It is important what time Kitsap County Sheriff's Office Detective Hedstrom arrived. Since Green and Hedsrom have somehow mixed these times up, Green has testified to hearsay.

Mathes then argues that the police reports, from which he mined his alleged inconsistent/perjured statements, are not admissible because they are hearsay. Further, a conviction based on perjury cannot stand.

First, Mathes accused Ms. Toste of perjury in another connection in his argument on ineffective assistance. The brief analysis of

materiality there included applies equally well to the claims in this section. How Ms. Toste got to his house and what time and in what order police arrived at the scene are simply not material to the questions of guilt being tried. Any mistakes or inconsistencies by the witnesses on these points are not, then, perjury.

Further, the state agrees that police reports are not generally admissible: they are usually hearsay themselves and contain hearsay. But nothing forecloses the use of them for impeachment if trial counsel believed that inconsistencies on these points would assist the case.

The claim fails because it lacks factual support. Mathes has not proven by preponderance that any evidence in the case resulted from perjured testimony.

***5. Appearance of Fairness***

Here, Mathes alleges that the trial judge was not impartial. This is shown because the trial judge ruled against him on several legal points.

First, the judge exhibited a lack of impartiality by its CrR 3.5 ruling. Since Mathes was on medication, had a history of drug abuse, and had a history of mental health issues, the trial court erred in allowing admission of his statements to law enforcement after the shooting and in the hospital. This issue was raised and decided against Mathes on direct

appeal. The present argument is successive. Since the trial court did not err in applying the law, it cannot be said that he was biased.

Second, the trial judge revealed his bias in his ruling on diminished capacity. Mathes claims that an off-hand remark by the judge, that "we know the case now," shows that the trial judge did not know the law when first he ruled on admissibility of the defense. What is clear from the record, however, is that the judge's remark referred to knowing the case of the state versus James Mathes, having at the point of the second offer of proof heard most of the evidence in the case.

Third, the trial court's bias against Mathes is shown because sentencing was soon after trial and done without a presentence investigation. Herein the state concedes sentencing error. If this court remands for resentencing, Mathes may certainly request a presentence report.

Forth, the trial court displayed lack of impartiality by denying a request for an appellate bond. The convictions in this matter would provide any jurist with tenable grounds to deny such a request. There was no abuse of discretion.

Fifth, the trial judge showed bias against Mathes by sentencing him on incorrect criminal history. This was not bias but an error based

on erroneous information given to the trial court. The state has conceded the error.

Sixth, the trial court showed its bias because, allegedly, police would not cooperate with defense interviews and the prosecution was allowed to conduct interviews. The state has no information with which to address this claim.

Finally, the trial court exhibited its bias by allowing the lead investigator to sit at counsel table with the prosecutor. But the law allows the lead investigator to sit with the prosecutor during trial. ER 615; *see U.S. v.Cueto,* 611 F.2d 1056 9 (5th Cir. 1980)

***6. Prosecutorial Misconduct***

Here, Mathes claims that it was misconduct to amend the charges just before trial. This occasioned Mathes to have to choose between speedy trial and preparation for the additional charges.

Prosecutorial misconduct is reviewed for abuse of discretion. *See State v. Brett*, 126 Wn.2d 136, 174-75, 892 P.2d 291 (1995). The defense has the burden of establishing that the prosecutor's conduct was both improper and prejudicial. State v. Song Wang, (No. 76369-5-I) __Wn. App. __, __ P.3d __ (August 27, 2018). "To establish prejudice, the defendant must show "a substantial likelihood that the misconduct

affected the jury verdict."" Id.

Further, he claims that there was misconduct because he was not timely bound over to superior court on March 28, 2014. We have shown above that that arraignment date was well in advance of the stipulated bindover time-limit.

The prosecutor committed misconduct in failing to subpoena a witness, which failure led to a continuance of the trial date. The state has insufficient information to address this claim. This alleged occurrence does not appear in any of the transcription filed on direct appeal.

Moreover, the prosecution here used false evidence, here iterating his claim above that Ms. Toste, Ms. Vierra, and Detective Green gave perjured testimony. These allegations have been addressed twice above. There was no perjury.

More still, the prosecution committed misconduct in closing argument as evidenced by news reports of what was said, and because the record was (and is) unclear as to how many shots were fired and by whom. On this point, he argues that he will show that he fired but one shot…but he never does. The jury decided how many shots were fired or whether that even mattered to them. The jury was the sole judge of the credibility of all the evidence in the matter. *See* CP 133 (jury properly

instructed).

Next is an iteration of his complaint about the trial court's CrR 3.5 ruling. Now it was prosecutorial misconduct that his lack of sobriety and mental state militate against the trial court's ruling. But the trial court ruled the evidence admissible and the prosecutor argued admitted evidence. There is no showing of misconduct.

Further, his confessions as he calls them were coerced by the police and the prosecution knew that they should not have been used. Again, the trial court ruled that the statements were not coerced. The prosecutor did not commit misconduct by arguing admissible evidence. Moreover, confession voluntariness was not an issue raised by the defense below or on direct appeal.

Finally, prosecutorial misconduct, says Mathes, is seen in the release of an inquest report absolving the officers for shooting Mathes. That the police acted appropriately in discharging their weapons is not relevant to whether or not James Mathes committed multiple crimes. No argument was advanced by the defense in this case that the officers did not appropriately respond to Mathes aiming and firing at them. Moreover, there is no information in this record that any of the jurors knew of the inquest finding or, more to the point, whether such

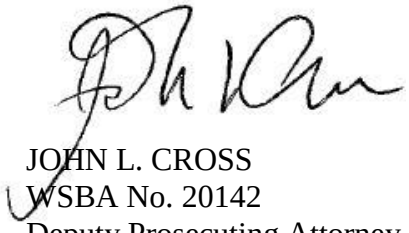
knowledge prejudiced the jury in any way. This issue is speculative at best and in no way bottoms an inference of prosecutorial misconduct.

## VI. CONCLUSION

The matter should be remanded for resentencing on a correct offender score. In all other respects, Mathes's petition should be denied.

DATED September 20, 2018.

Respectfully submitted,
TINA R. ROBINSON
Prosecuting Attorney



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# APPENDIX A

1 2 cts. 62

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KITSAP COUNTY

FILED
KITSAP COUNT
93 JAN 29 AM 11:57
ROBERT J. FREUDENSTEIN
BY _____ DEPUTY

STATE OF WASHINGTON, Plaintiff,

-vs-

JAMES C. MATHES, Defendant.

NO. 92-1-00857-1

JUDGMENT AND SENTENCE (SENTENCING REFORM ACT)

FINDINGS OF FACT

1. On the 29th day of January, 1993, the defendant was found guilty by (plea) (court verdict) (jury verdict) of the following:

| | OFFENSE, RCW CITATION AND CRIME CODE | OFFENSE DATE |
|---|---|---|
| Count I | POSSESSION OF A CONTROLLED SUBSTANCE: 740 gr. MARIJUANA 69.50.401 07346 | 12/10/92 |
| Count II | THIRD DEGREE ASSAULT 9A.36.031 01102 | 12/10/92 |
| Count III | | |

93-9-00242-7

2. A sentencing hearing in this case was held on the 29th day of January, 1993, at which time the following persons were present:

Defendant's Lawyer: ROGER HUNKO
Deputy Prosecuting Attorney: DIANE F. RUSSELL
Other:

3. Defendant was asked if there was any legal cause why judgment should not be pronounced and no legal cause was alleged.

4. The defendant's criminal history and prior convictions are as follows:

[____] None known and the defendant swore under penalty of perjury that he has no convictions.

| OFFENSE/DATE | LOCATION/DISPOSITION/DATE |
|---|---|
| TAKING A MOTOR VEHICLE WITHOUT OWNERS PERMISSION (TAMVWOP) 11/14/91 | KITSAP GUILTY 7/8/92 |
| TAMVWOP 7/29/87 | KITSAP GUILTY 10/13/88 |
| TAMVWOP 5/17/87 | KITSAP GUILTY 7/7/87 |
| 3 counts of 2° Burglary as a juvenile, adjudicated on 5/15/84 | |



28

and/or

[ ] non first-offender, but no criminal history that would count under the SRA

or

[ ] none of a nature which would deny the defendant first-time offender sentencing under RCW 9.94A.120(5) given the non-violent nature of the present offense (RCW 9.94A.030(18)).

5. Additional facts as to the nature of the offense(s) in this case are:

[X] as stipulated between the parties, said stipulation being part of the Plea Agreement previously filed in this cause; and/or

[ ] as stated in the attached appendix and are incorporated by reference into these Findings of Fact.

6. The maximum terms for the crime(s) for which the defendant was convicted are as follows:

Count I: FIVE years and/or a $ 10,000 fine
Count II: FIVE years and/or a $ 10,000 fine
Count III: _____ years and/or a $_____ fine

7. The presumptive sentencing range for the crime(s) for which the defendant was convicted is as follows:

Count I: 3- 8 months; (offender score 4; seriousness score I)
Count II: 12+-16 months; (offender score 4; seriousness score III)
Count III: _____; (offender score _____; seriousness score _____)

8. The Court makes the following findings as indicated:

[ ] The defendant has served _____ days in confinement before sentencing and said confinement was solely in regard to the offense(s) for which the defendant is now being sentenced.

[ ] The defendant, pursuant to RCW 9.94A.140(2), has agreed to pay restitution to victims of offenses not prosecuted as set forth in the Plea Agreement previously filed in this cause.

[ ] Findings of Fact and Conclusions of law setting forth reasons for the court's decision to sentence outside the presumptive range are as stated in the attached appendix and are incorporated by reference into these Findings of Fact.

[ ] Defendant is not a violent offender under RCW 9.94A.030(18) and, pursuant to RCW 9.94A.380, the court has considered and given priority to alternatives to total confinement and has decided, to the extent indicated in the Judgment and Sentence, to impose a sentence

of total confinement. The reasons for not utilizing alternatives to total confinement, to the full extent possible, are as follows:

_____

_____.

[ ] The crimes charged in Counts _____ and _____ encompass the same criminal conduct under RCW 9.94A.400(1)(a), and are counted as only one crime in determining criminal history.

[ ] The defendant has been convicted of a drug offense under chapter 69.50 RCW and the court finds that the related drug offense is one associated with the use of hypodermic needles.

9. The Court having reviewed the Presentence Determination of Defendant's Financial Status Report, completed under oath and submitted by the defendant to this Court, and/or having considered the admissions of the defendant, finds the defendant is:

[ ] Indigent and has no ability to pay at anytime.

[X] Indigent, but the indigency status is likely to change in the future and the defendant will have the future ability to pay.

[ ] Not indigent and has the present and future ability to pay.

[ ] The defendant has and/or will have the ability to make monthly payments towards the financial obligations imposed by this Judgment and Sentence as determined by defendant's own admission.

From the foregoing Findings of Fact the Court now makes the following:

CONCLUSIONS OF LAW

1. The court has jurisdiction over the parties and subject matter of this action.

2. The defendant is guilty of the crime(s) set forth in Finding of Fact 1.

3. That on the basis of said conviction(s) and the defendant's prior criminal history, the defendant is subject to the maximum term(s) set forth in Finding of Fact 6 and the presumptive sentence range(s) set forth in Finding of Fact 7.

4. The court also concludes as indicated:

[ ] the defendant is a first-time offender as defined by RCW 9.94A.030(12); and/or

[ ] there exist substantial and compelling reasons justifying an exceptional sentence; and/or

[X] sentencing within the standard range is appropriate.

[ ] the defendant should undergo HIV testing in accordance with the requirements of RCW 70.24 et seq.

[X] 5. Based on the defendant's financial status set forth in Findings of Fact 9, the defendant has and/or will have the ability to pay $___ _____ monthly towards the financial obligations imposed by this Judgment and Sentence, an amount to be set by CCO.

OR

[ ] 6. Based on the defendant's admission set forth in Findings of Fact 9, the defendant has and/or will have the ability to pay $_____ monthly towards the financial obligations imposed by this Judgment and Sentence.

OR

[ ] 7. Based on the defendant's financial status set forth in Findings of Fact 9, the defendant is indigent and does not and will not have the ability to pay towards the financial obligations imposed by this Judgment and Sentence.

On the basis of the foregoing Findings of Fact and Conclusions of Law, and the court having determined that no legal cause exists as to why judgment should not be pronounced, the court now makes and imposes the following:

JUDGMENT AND SENTENCE

The defendant is guilty of the crime(s) set forth in Finding of Fact 1, and is sentenced as indicated:

[ ] 1. FIRST TIME OFFENDER (RCW 9.94A.120(5)). The imposition of sentence within the sentence range is waived, and the defendant shall be on a program of community supervision for a period of _____ month(s), and shall follow each and every one of the requirements of said program imposed by the Department of Corrections and the supervising community corrections officer(s). In addition to the requirements so imposed, and in addition to any term(s) of confinement and financial obligations otherwise specified herein, the defendant shall be subject to specific requirements as indicated:

[ ] The defendant's period of community supervision shall begin this date and shall be tolled during the time for which the defendant is in total or partial confinement.

[ ] The defendant shall be subject to the following crime-related prohibitions: Do not violate the uniform controlled substances act. Do not use, possess or allow others to use or possess in your presence or on your premises any controlled substance. Submit to urine tests and searches of person, property, residence, or vehicle at direction of CCO.

[ ] The defendant shall obey all laws of the State of Washington and comply with any conditions set by his community corrections officer.

[ ] The defendant shall seek and maintain regular schooling, training, and/or employment as directed and approved by the community corrections officer.

[ ] The defendant shall not leave the State of Washington without the permission of the community corrections officer, and shall be subject to whatever other geographic limitations are imposed by the community corrections officer.

[ ] The defendant shall maintain his/her residence and shall not change that residence without the prior permission of the community corrections officer.

[ ] The defendant shall undergo available outpatient alcohol/drug/_____ screening and shall follow the recommendations of the screening under the supervision and direction of his community corrections officer.

[ ] The defendant shall perform _____ hours of community service. (Use only if first-offender and no jail time is imposed.)

[ ] _____

_____

_____

[X] 2. The defendant is sentenced to a term of confinement as follows: (Use for all defendants who receive a jail sentence or prison term.)

Count I 8 ~~days~~/(months) confinement. (____ days/months confinement shall be converted to _____ days/months partial confinement if work release eligible and/or _____ days confinement shall be converted to ____ hours of community service.)

Count II 12 + 1 day~~s~~/months confinement. (_____ days/months confinement shall be converted to _____ days/months partial confinement if work release eligible and/or _____ days confinement shall be converted to _____ hours of community service.)

Count III _____ days/months confinement. (_____ days/months

confinement shall be converted to _____ days/months partial confinement if work release eligible and/or _____ days confinement shall be converted to _____ hours of community service.)

Any defendant who receives work release shall abide by all rules, requirements and/or conditions placed upon him/her by work release. Further, while in the work release program the defendant shall be required to comply with crime related prohibitions.

/__/ 3. If community service is ordered, the defendant must complete the community service at a rate of _____ hours per month.

/__/ 4. The defendant is given credit for _____ days confinement previously served.

/X/ 5. The defendant shall not have any contact with the following individuals or class of individuals for a period of Five years: Known drug users, deliverers or manufacturers.
(Up to the statutory maximum pursuant to RCW 9.94A.120(16)).

/__/ 6. SUPERVISION FOR PERSONS WITH CONFINEMENT OF TWELVE (12) MONTHS OR LESS; NON-FIRST TIME OFFENDER. Pursuant to RCW 9.94A.120(11) and RCW 9.94A.383, the defendant shall be on a program of community supervision for a period of _____ month(s), and shall follow each and every one of the requirements of said program imposed by the Department of Corrections and the supervising community corrections officer(s). In addition to the requirements so imposed, and in addition to any term(s) of confinement and financial obligations otherwise specified herein, the defendant shall be subject to specific requirements as indicated:

/__/ The defendant's period of community supervision shall begin this date and shall be tolled during the time for which the defendant is in total or partial confinement.

/__/ The defendant shall be subject to the following crime- related prohibitions: Do not violate the uniform controlled substances act. Do not use, possess, sell, deliver any controlled substance, or allow them to be so treated in your presence or on your premises. Submit to urine tests and searches of person, property, residence, or vehicle at the direction of CCO.

/__/ The defendant shall comply with any conditions set by his community corrections officer.

/__/ The defendant shall not leave the State of Washington without the permission of the community corrections officer, and shall be subject to whatever other geographic limitations are imposed by the community corrections officer.

[ ] The defendant shall immediately notify the community corrections officer of any change in his/her address and/or employment.

[ ] _____

_____

_____

[X] 7. COMMUNITY PLACEMENT SUPERVISION OF TWELVE (12) MONTHS (TWO YEARS, OR UP TO THE PERIOD OF EARNED EARLY RELEASE). Pursuant to RCW 9.94A.120(8), the defendant shall be on a program of community placement supervision for a period of twelve (12) months, beginning either upon completion of the term of confinement or at such time as the defendant is transferred to community custody in lieu of earned early release, and shall follow each and every one of the requirements of said program imposed as follows:

The defendant shall report to and be available for contact with the assigned community corrections officer as directed.

The defendant shall work at a department of corrections approved education, employment, and/or community service.

The defendant shall not use, possess, sell, deliver, or allowed to be used, possessed, sold or delivered on his/her premises, any controlled substance unless he/she has a valid prescription authorizing such use or possession.

The defendant shall pay community placement fees as determined by the Department of Corrections.

In addition to the requirements imposed above, the defendant shall be subject to specific requirements as indicated:

[ ] Remain within/outside the borders of _____ unless he obtains written permission from his community corrections officer to leave/enter the above described area;

[X] Shall not have direct or indirect contact with the victim of the crime;

[X] Shall not have direct or indirect contact with Known drug users or delivers, or manufacturers (specify class of individuals);

[X] Participate in crime related treatment or counseling services;

[ ] Abstain from the use of intoxicants;

[ ] Obtain the prior approval of the Department of Corrections regarding the living arrangements if defendant is a sex offender;

[X] Shall be subject to the following crime related prohibitions: Submit to urine tests and searches of person, property, residence or vehicle at direction of CCO, do not assault any other people.

[ ] 8. The defendant is hereby ordered to report to the Department of Corrections to arrange for the payment of his/her financial obligations. The defendant is ordered to advise the Department of Corrections of his/her current address. In addition, the defendant is required to report any change of address to the Department of Corrections for a ten (10) year period or until his/her financial obligations have been satisfied.

The defendant shall further pay by cash, money order, or certified check to the Clerk of the Superior Court at 614 Division Street, MS 34, Port Orchard, Washington 98366-4676, as indicated:

[ ] $70.00 minimum to the Crime Victim's Compensation Fund if the crime was committed before July 23, 1989;

[X] $100.00 minimum to the Crime Victim's Compensation Fund if the crime was committed after July 23, 1989;

[X] $ 110.00 court costs (~~$70.00 filing fee if filed befor 4/1/92,~~ $110.00 if filed after 4/1/92); $_____ subpoena fees; $_____ witness fees; $_____ summons service fees)

[X] ~~$877.00 reimbursement for court appointed attorney fees;~~ $260.00

[X] ~~$1,000.00~~ $ 100.00 contribution to the Washington State Patrol Special Investigations Unit Fund;

[X] $100.00 Washington State Patrol Crime Laboratory analysis fee if the crime occurred on or after June 11, 1992 (not to be suspended except upon a finding by the court that the defendant does not have the ability to pay the fee after the court has received a verified petition from defendant pursuant to RCW 43.43).

[ ] $_____ fine;

[ ] $_____ reimbursement for extradition costs payable to: _____;

/__/ Other: _____
_____;

/__/ The defendant shall make restitution

/__/ As determined by separate order.

/__/ In the amount of $_____, payable through the Clerk of the Court to be disbursed to: _____
_____
_____.

The restitution amount shall bear interest of twelve percent (12%) per annum on the declining balance from the date of the commission of the crime, to-wit: the _____ day of _____, 19____.

The defendant shall pay any and all costs related to his/her participation in the work release program in accordance with a payment schedule set up by work release.

The defendant shall make monthly payments on his financial obligations of no less than $_____ per month, payable on the ~~1st~~ day of each month, commencing on the 60th day of release ~~19____~~. from custody in an amount set by his community corrections officer.
The court retains jurisdiction over the defendant for a period of ten (10) years concerning the payment of financial obligations.

/__/ 9. The court having determined that the defendant has the present means to pay for the cost of incarceration, the defendant shall pay $50.00 per day of incarceration. However, payment of other court-ordered financial obligations, and costs of supervision shall take precedence over payments for incarceration. All funds recovered from the defendant for the cost of incarceration in the county jail shall be remitted to the county, and the costs of incarceration in prison shall be remitted to the Department of Corrections.

/__/ 10. Pursuant to RCW 9.94A.145, the court orders that a notice of a payroll deduction is to be immediately issued for the defendant and is to be arranged by the Department of Corrections.

The court retains jurisdiction over the defendant for a period of ten (10) years concerning the payment of financial obligations. Pursuant to RCW 9.94A.145, a notice of payroll deduction for the defendant may be issued or other income-withholding action may be taken by the Department of Corrections without further notice to the defendant. such action may be taken only if the defendant's monthly court-ordered legal financial obligation payment is not paid when due, and an amount equal or greater than the amount payable for one month is owed.

[ ] 11. Pursuant to RCW 43.43.754, a blood sample shall be drawn from this defendant for the purposes of DNA identification analysis. If the defendant is incarcerated at the Kitsap County Correction Center, the blood draw will be performed by Kitsap county Corrections Center personnel. If defendant is incarcerated at a State Institution, the blood draw will occur at the respective institution. If the defendant is not or will not be presently incarcerated, the blood draw shall be completed within 30 days of this date.

[ ] 12. Defendant shall undergo HIV testing on/before the _____ day of _____, 19_____. Testing shall be conducted by the Bremerton-Kitsap County Health Department in accordance with the requirements of RCW 70.24 et seq.

[X] 13. Pursuant to RCW 46.52.100, the Department of Licensing shall be informed of the conviction for this offense in which a motor vehicle was used.

[X] 14. Other: This term shall run consecutive to 60 days committment in 92-1-00092-8, but concurrent with sentencing violations in 87-1-00223-1, 88-1-00010-5, and 92-1-00092-8.

[ ] 15. Defendant shall forfeit any and all interest he/she has in the following:

[ ] firearms: _____
_____
pursuant to RCW 9.41.098; and/or

[ ] materials, products, equipment, vehicles, money, etc:_____
_____
_____
_____
pursuant to RCW 69.50.505.

[ ] (other) _____
_____
_____
_____

[X] 16. In accordance with the multiple offender provisions of RCW 9.94A.400, the terms of confinement shall run concurrently~~/consecutively.~~

It is further ORDERED that any bail, bond and/or conditions of personal recognizance are hereby exonerated.

DONE IN OPEN COURT, in the presence of the defendant this 29th day of January, 1993.

JUDGE

A petition or motion for collateral attack on a judgment and sentence in a criminal case may not be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face unless the petition or motion is based solely on one or more of the grounds listed in RCW 10.73.100. "Collateral attacks" include, but are not limited to, personal restraint petitions, habeas corpus petitions, motions to vacate judgment, motions to withdraw guilty plea, motions for new trials, and motions to arrest judgment.

FINGERPRINTS

Race: White
Sex: Male
DOB: 4/21/69
Address:
Phone No.:
SID Number: WA13606984
FBI Number: 176746HA4

DATED this 29th day of January, 1993.

FINGERPRINTS ATTESTED BY:

ROBERT L. FREUDENSTEIN
CLERK

By: Susan Whitney
DEPUTY CLERK

PRESENTED BY:

DIANE F. RUSSELL
Deputy Prosecuting Attorney
WSBA No. 16190

APPROVED FOR ENTRY:

ROGER HUNKO
Attorney for Defendant
WSBA No. 9255

# APPENDIX B

# KITSAP COUNTY DISTRICT COURT, STATE OF WASHINGTON

| | |
|---|---|
| STATE OF WASHINGTON,<br>Plaintiff,<br>v.<br>James Mathes,<br>Defendant. | No. 10120237P<br>10120238P<br>**STIPULATION OF DEFENDANT TO DEFER BINDOVER AND EXTEND JURISDICTIONAL TIME LIMITS**<br>(CrRLJ 3.2.1(g)(3))) |

I am the Defendant in this case. I understand that my case must be removed from District Court and bound over to Superior Court within thirty days of the filing of the felony complaint if I was detained in jail, or subject to conditions of release based upon the filing of the felony complaint in the above cause.

I have been advised that I may waive my right to have this matter bound over to Superior Court within thirty days, and that I may stipulate that this case may remain in the jurisdiction of the District Court for an agreed and specified time. I have consulted with my attorney on this matter and believe that it serves my interests to continue this matter in District Court for a limited and specified time.

No one has made any threats or promises to get me to waive my right to be bound over to Superior Court within thirty days, and I hereby voluntarily stipulate that this matter may remain in the jurisdiction of the District Court until April 28, 2014.

ORDERED

☒ **Defendant shall follow all previously ordered conditions of release which remain in effect.**

☒ **It is ordered that the defendant shall appear before court on the following date(s):**

COURT DATES

☒ Felony Status: April 8, 2014 - Courtroom 104

☒ Felony Bind Over: April 24, 2014 - Courtroom 104

☐ Arraignment/Change of Plea: _____ - Superior Courtroom 212

WARNING: IF DEFENDANT FAILS TO COMPLY WITH ANY OF THE ABOVE, A BENCH WARRANT MAY BE ISSUED.

DATED AND FILED 2/27/14

DEFENDANT

JUDGE Pro Tem Laumann

PROSECUTING ATTORNEY 34271

DEFENDANT'S ATTORNEY 23564

THIS IS CERTIFIED TO BE A
TRUE AND CORRECT COPY:

CLERK

20 DAY OF Sept. 2018

KITSAP COUNTY DISTRICT COURT

## KITSAP COUNTY PROSECUTOR'S OFFICE - CRIMINAL DIVISION

## September 20, 2018 - 3:33 PM

## Transmittal Information

| | |
|---|---|
| **Filed with Court:** | Court of Appeals Division II |
| **Appellate Court Case Number:** | 51736-1 |
| **Appellate Court Case Title:** | Personal Restraint Petition of: James Charles Mathes |
| **Superior Court Case Number:** | 14-1-00301-1 |

**The following documents have been uploaded:**

- 517361_Briefs_20180920153240D2477470_4289.pdf
  This File Contains:
  Briefs - Respondents
  *The Original File Name was In re James Charles Mathes 51736-1-II.pdf*

**A copy of the uploaded files will be sent to:**

- KCPA@co.kitsap.wa.us
- csuff@jhblawyer.com
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- lorie@jhblawyer.com
- rsutton@co.kitsap.wa.us

**Comments:**

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Sender Name: Sheri Burdue - Email: siburdue@co.kitsap.wa.us
**Filing on Behalf of:** John L. Cross - Email: jcross@co.kitsap.wa.us (Alternate Email: )

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Port Orchard, WA, 98366
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